



# CPI Antitrust Chronicle

February 2015 (2)

The EU Directive on Antitrust  
Damage Actions and the Role  
of Bundling Claims by  
Assignment

Till Schreiber & Martin Seegers  
CDC Cartel Damage Claims Consulting

# The EU Directive on Antitrust Damage Actions and the Role of Bundling Claims by Assignment

Till Schreiber & Martin Seegers<sup>1</sup>

## I. INTRODUCTION

Private enforcement is one of the hot topics of EU competition law, in particular since the adoption of Directive 2014/104 on antitrust damages actions (the “Directive”).<sup>2</sup> The Directive codifies case law of the EU courts on the right to obtain full compensation for infringements of EU competition law and provides for a common legal framework throughout the Union. Nevertheless, due to significant practical hurdles the majority of victims—in particular of hard-core cartels—still do not actively pursue their damage claims.

One effective solution that has evolved in the European Union and that, in practice, turns complex and burdensome antitrust claims into valuable assets, is the transfer of claims to a specialized entity, also referred to as “claims vehicle.” This approach *de facto* results in a collective claims enforcement, while avoiding problems often associated with class or group actions.

## II. PRACTICAL DIFFICULTIES TO FULL COMPENSATION

The enforcement of antitrust damage claims is complex and requires a combination of specific economic, legal, and IT expertise. Despite the efforts of the EU legislators, end-consumers, small-and medium-sized businesses (“SMEs”), and even large corporate victims continue to face many practical difficulties. The main obstacle for successful damage actions remains the substantiation and proof of individual effects by market-wide competition law infringements, most notably cartels.

Such economic analysis and quantification, including causality aspects, typically require detailed data and information covering the affected market before, during, and after the cartel infringement. Other practical obstacles include:

- existing information asymmetries and lack of evidence due to the secret nature of cartels;
- a potential strain on commercial relationships;
- drawn-out litigation due to the inherent legal and economic complexity;
- high costs for lawyers and economic experts; and
- depending on the jurisdiction, potentially high court fees and a structural cost risk asymmetry between claimants and defendants, given that cartels always have numerous participants.

---

<sup>1</sup> Respectively, managing director and senior legal counsel, CDC Cartel Damage Claims Consulting, Brussels.

<sup>2</sup> Directive 2014/104 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Unions, *available at* <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0104&from=EN>.

### III. BUNDLING OF CLAIMS BY A SPECIALIZED ENTITY AS AN EFFECTIVE SOLUTION

These disincentives inherent in the private enforcement of cartel-related damage claims contributed to the emergence of specialized companies offering solutions to corporate cartel victims to effectively outsource the substantiation and pursuit of their damage claims through judicial means or out-of-court settlements. A central element of these solutions typically consists in the transfer and sale of damage claims by a multitude of companies harmed by one and the same cartel to an entity that effectively bundles multiple claims. This bundling at a material law level in particular helps to overcome existing economic disincentives and information asymmetries.

In practice, the purchasing of a critical mass of antitrust claims required to merit an enforcement action leads to the creation of significant synergies which contribute both to the optimization of the economic analysis and evidence as well as to the maximization of a successful claims enforcement. Ideally, the specialized entity combines a broad range of economic, legal, and technical know-how, combined with measure-made IT solutions which facilitate the gathering and analysis of all relevant market data.

Indeed, the combined transaction data gathered from a large number of cartel victims and covering a longer period of time allows for a comprehensive economic assessment of the cartel effects on the market as a whole, and in respect of potential passing-on effects to further levels of the supply chain. Under these conditions, entities with specialized know-how hold stronger positions in out-of-court negotiations or, in case of failure to reach a settlement at fair conditions, are able to present a clear and sound economic picture on the respective cartel effects in one single action for damages.

### IV. RECOGNITION OF BUNDLING AT NATIONAL AND EU LEVELS

The model of bundling antitrust damage claims by assignment has been widely recognized at both national and EU levels.

#### *A. At the National Level*

At the national level, courts in the Netherlands, Germany, Austria, and Finland have expressly confirmed the standing of specialized entities that had previously purchased a multitude of damage claims by way of assignment. For example, the District Court in Helsinki, by interim judgment of July 4, 2013 (judgment 6492, reference 11/16750) in the action brought by CDC Cartel Damage Claims (“CDC”) in relation to damage claims following from the European Hydrogen Peroxide cartel, confirmed the validity of the assignments to the plaintiff by several Finnish pulp and paper manufacturers and thus the standing of the plaintiff. The Helsinki court referred *inter alia* to “CDC’s better resources for gathering the information necessary for the matters under consideration” and the fact that the pulp and paper companies did not succeed on their own to settle their claims out-of-court and only subsequently decided to sell their claims to CDC.

Similarly, the Court of Appeal in Amsterdam held in its judgment of January 7, 2014 (reference 200.122.098/01) in the context of the action brought by the specialized entity East West Debt (“EWD”) against members of the European Air Cargo cartel:

“In the present case KLM and Air France have extensively discussed the phenomenon of litigation funding and the qualification of EWD as a litigation vehicle or claim vehicle, taking into account that EWD attempts to find monetary compensation for damage claims of several injured companies on a commercial basis. What KLM and Air France have said on this, for now does not justify the conclusion that in the present case there is an abuse of civil procedure by EWD or conduct that is otherwise impermissible in the context of obtaining compensation for damages. This also does not give ground at present to place further requirements on EWD on the basis of due process or the protection of the interests of KLM et al and/or the companies of which the claim have been assigned to EWD.”

### ***B. At the EU Level***

The validity and the significant role in the context of private enforcement of the model to bundle and enforce a multitude of antitrust damage claims by specialized entities has also been confirmed at the EU level. In its 2008 Impact Study, the European Commission explicitly stated that such collective enforcement of bundled claims is possible in most EU jurisdictions. And a study prepared for the European Parliament in 2012 stated that the “claims transfer to a third party may help to overcome the problem of lack of participation by injured parties.”

In line with these preparatory works and the national case law, the Directive now explicitly confirms the standing of entities purchasing damage claims in Article 2(4):

“‘action for damages’ means an action under national law by which a claim for damages is brought before a national court by an alleged injured party, or by someone acting on behalf of one or more alleged injured parties, where Union or national law provides for this possibility, or by the natural or legal person that succeeded in the right of the alleged injured party, including the person that acquired the claim.”

Further, the possibility to enforce antitrust claims by an entity that acquired the claims from a damaged person is recognized in Article 7(3) of the Directive.

Finally, in his recent opinion in the preliminary ruling concerning certain aspects of the legal action brought by CDC against members of the European Hydrogen Peroxide cartel before the Regional Court of Dortmund, Germany, Advocate General Jääskinen (Case C-352/13) stated:

“The emergence of players on the judicial scene, such as the applicant in the main proceedings, whose aim it is to combine assets based on claims for damages resulting from infringements of EU competition law, seems to me to show that, in the case of the more complex barriers to competition, it is not reasonable for the persons adversely affected themselves individually to sue those responsible for a barrier of that type.”

The overall effects of “claims vehicles” on the private enforcement of competition law in the European Union have not been explored yet. However, it is already safe to assume that such entities have already been successful in and out of court where single damage actions would either not have been initiated or—in a worse case—would have failed. Some of the largest antitrust damage actions currently pending before national courts in the European Union (in particular in the Netherlands, Germany, Austria, and Finland) have been brought on the basis of the assignment model.

Claims vehicles have also achieved a multitude of ground-breaking judgments in various jurisdictions on important legal and procedural issues. The claims assignment model thus contributes to the achievement of the main objective behind the EU courts' and legislator's will in relation to private enforcement: the effective application of the EU competition rules.

## V. CLAIMS PURCHASE DOES NOT FALL UNDER THE RECOMMENDATION ON COLLECTIVE REDRESS

The bundling of antitrust damage claims by way of assignment is not a group or representative action falling under the Commission's Recommendation 2013/396/EU on collective redress mechanisms.<sup>3</sup> This non-binding recommendation addresses procedural aspects of collective actions in relation to violations of rights granted under EU Law, including competition law.

The assignment model, however, concerns bundling at a material level: The entity acquiring the damage claims is, for reasons of legal succession, acting in its own right. The buyer is not acting for or on behalf of the original claims holders, but in its own name and account. As a result there is only one claimant seeking compensation for one aggregated claim consisting of a multitude of acquired claims.

The transfer of multiple damage claims is an independent legal alternative to (procedural) forms of class actions, group actions, or representative collective actions. It can best be compared with an "opt-in" collective mechanism. Overall, EU Member States have widely been hesitant to introduce U.S.-style "opt-out" class actions. However, there have been recent legislative initiatives in Italy, Portugal, Belgium and France which include group and collective actions for consumers and/or businesses and that are, in principle, applicable in the context of antitrust damage claims. Also the United Kingdom is in the process of adopting the Consumer Rights Bill, which in its current state includes the possibility of collective actions on an "opt-out" basis, though essentially limited to the United Kingdom. All of these collective mechanisms are, however, subject to a number of conditions and to strict judicial control in order to avoid what has been perceived by many commentators in Europe as abusive U.S. class action litigation. Such collective mechanisms seem in particular to be justified in cases of relatively low-level damages that are dispersed across a large group of victims, especially at the level of end-consumers.

For corporate victims the assignment of claims to a specialized entity will, irrespective of the availability of opt-out collective actions, remain an interesting alternative which simultaneously avoid problems associated with opt-out actions, in particular for following reasons:

- The involvement of a specialized third party with the necessary know-how and resources ensures a careful *ex-ante* assessment that only meritorious claims are pursued;
- The allocation of the proceeds is not a problem as the victims—in the form of single assignors—as well as their share in the overall damage recovery, can be clearly defined;

---

<sup>3</sup> Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, *available at* <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013H0396&from=EN>.

- The assignment model avoids problems and uncertainties which are usually associated with the class certification process; and
- The assignment model does not require major changes of civil procedure rules and is in line with the legal cultures and principles in most EU Member States.

## VI. LEGAL FRAMEWORK AND FUNDING

It is general practice in many business areas that claims may be transferred to a third party. The sale of antitrust damage claims to a specialized entity constitutes, as set out above, an attractive alternative for victims of illegal cartels to effectively obtain compensation. Such a *modus operandi* is typically formalized by a claims purchase and transfer agreement between the cartel victim (the seller) and the specialized entity (the purchaser). The provisions governing such claims purchase and transfer agreement are subject to the general civil law of the applicable legal order. Terms and conditions are negotiated at arm's length between the parties.

Specialized entities purchasing antitrust damage claims may be subject to specific regulatory provisions. In Germany, for example, they might have to fulfil the requirements of the German Legal Services Act, which sets out the obligations that any provider of legal services has to fulfil in relation to personal ability and reliability, financial situation, and know-how. In its judgment of 17 December 2013 (reference 37 O 200/09), the first instance court of Düsseldorf furthermore required that entities purchasing damage claims need to have the financial means to pay the adverse legal costs at the time of concluding the assignment agreements.

This underlines the importance for specialized entities active in this field to be able to secure a solid source of funding. Such funding can either be obtained internally (e.g. funds from out-of-court settlements or successful prior damage actions) or externally from third-party funders or investors.

For litigation funders, antitrust damage claims—in particular if bundled by a specialized entity—are potentially valuable assets with a possibly attractive expected return on investment. This is especially the case for “follow-on” damage actions where an infringement has already been found by a competition authority. In addition, statutory interest accruing from the date the damage was caused boosts the value of the damage claim. This enables entities bundling antitrust damage claims to get, if and to the extent that it is required, access to funding, and ensures that antitrust cases are solidly financed and can be pursued through to the end, taking into account the legal and financial requirements of such complex litigation.

An important feature of the claims assignment approach as outlined in this article is that careful *ex-ante* case selection and management, often combined with in-depth legal and economic due-diligence, ensures that only meritorious claims are pursued. Every entity willing to invest significant amounts of capital and resources has an incentive to limit the risks that flow from unmeritorious claims, in particular the cost risks implied by the “loser pays rule” applicable throughout the European Union.

The described approach of bundling antitrust claims by assignment, possibly combined with third-party litigation funding, ensures access to justice in relation to justified damage claims which otherwise would be foregone. Ideally, this not only results in the successful recovery of

damages, but it also avoids the perpetuation of a situation of unjust enrichment by the cartel members, and thus strengthens the overall effectiveness of EU and national competition law.